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RE: EPA-HQ-OAR-2021–0566 – Notice of Opportunity To Comment on Proposed Denial of Petitions for Small Refinery Exemptions

The American Fuel & Petrochemical Manufacturers ("AFPM") submits these comments in response to the Environmental Protection Agency's ("EPA" or the "Agency") proposed denial of petitions for small refinery exemptions ("SREs" or "exemptions") under the Clean Air Act's ("CAA") Renewable Fuel Standard ("RFS") program.[1] AFPM is a national trade association whose members own and operate most of the United States' refining and petrochemical manufacturing capacity. AFPM members are directly regulated as obligated parties under the RFS and will be substantially affected by the outcome of EPA's decision on SRE petitions.

AFPM opposes EPA's proposed blanket denial of 65 pending SRE petitions. Because AFPM is not privy to the specific information the petitioning small refineries have provided regarding disproportionate economic hardship ("DEH"), AFPM cannot provide a detailed rebuttal regarding individual SREs. Nonetheless, EPA's proposal radically alters the Agency's prior interpretations of DEH.[2] A blanket denial subverts the CAA and recent judicial decisions confirming Congress's intent to exempt small refineries—who have a statutory right to present their case for an SRE to the Agency[3]—that experience DEH from RFS compliance. EPA's new approach effectively reads SREs out of the statute and is inconsistent with how the Department of Energy ("DOE") has interpreted the statute. EPA and DOE have long recognized this by relying on DOE's multi-factor scoring matrix; yet EPA has failed to adequately explain why all these factors are suddenly irrelevant. Under EPA's new interpretation, no refinery could ever qualify for an SRE.

Congress designed the SRE provisions not as a sunset provision providing temporary relief,[4] but to ensure small refineries experiencing DEH could obtain relief "at any time,"[5] recognizing conditions change significantly over time.[6] By definition, SREs are consistent with Congress's

[1] 86 Fed. Reg. 70,999 (Dec. 14, 2021); U.S. EPA, Proposed RFS Small Refinery Exemption Decision (Dec. 2021), https://www.epa.gov/sites/default/files/2021-12/documents/420d21001.pdf [hereinafter "SRE Denial"].
[2] 86 Fed. Reg. at 71,000.
[3] 42 U.S.C. § 7545(o)(9)(B)
[4] *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2180-81 (2021) (explaining extensively why the SRE provisions were not a "sunset" scheme meant to quickly end).
[5] 42 U.S.C. § 7545(o)(9)(B)(i).
[6] *HollyFrontier*, 141 S. Ct. at 2179 (2021).

statutory scheme. Penalizing small refineries by eviscerating SREs furthers no legitimate statutory purpose, either. SREs have not reduced ethanol blending, which remains at roughly 10 percent of the gasoline consumed no matter how many SREs are granted.[7]

The CAA requires EPA to make individual determinations based on the unique circumstances present in each of the 65 pending petitions. This includes considering myriad, constantly-changing conditions that can cause DEH to small refineries. Automatically denying all SREs may be administratively and politically convenient for EPA, but it comes at the cost of small refineries that Congress expressly protected.[8]

I. Background of SREs.

Congress recognized that small refineries are strategically important assets to U.S. energy security,[9] providing needed geographic diversity and often supplying underserved markets. These refineries provide thousands of high paying jobs in their regions, and their closure would not only directly impact refinery employees but could cause severe economic harm in those regions. Congress affirmed its support for SREs in several related CAA provisions. First, Congress gave all small refineries a blanket exemption from their RFS obligations until 2011.[10] Second, Congress required EPA to extend the blanket exemption for at least two additional years upon a DOE finding that RFS compliance would impose DEH for small refineries;[11] DOE made this finding, and the blanket exemption was extended through 2012. Finally, Congress authorized small refineries to petition EPA "at any time" for an extension of their exemption to RFS compliance "for reason of disproportionate economic hardship."[12] "Congress was concerned that escalating [RFS] obligations could work special burdens on small refineries that lack the inherent scale advantages of large refineries, and sometimes supply a major source of jobs in rural

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[7] In its recent rulemaking setting volume requirements for 2020, 2021, and 2022, EPA noted "E10 has been, and continues to be, economical for refiners and blenders," 86 Fed. Reg. 72,436, 72,447 (Dec. 21, 2021), and EPA "expects setting the implied volume for conventional renewable fuel below the E10 blendwall would have little impact on domestic biofuel production or use." *Id.* at 72,448.

[8] The SRE provisions acutely demonstrate Congress's awareness that additional regulation may disproportionately burden small refineries. Newell & Rogers, The U.S. Experience with the Phasedown of Lead in Gasoline 17, Resources for the Future (June 2003), https://web.mit.edu/ckolstad/www/Newell.pdf. *See also* Meyer & Taylor, The Determinants of Plant Exit: The Evolution of the U.S. Refining Industry 16-18, 17 Fig. 3, U.S. Fed. Trade Comm'n (Nov. 2015), https://www.ftc.gov/system/files/documents/reports/determinants-plant-exit-evolution-u.s.refining-industry/wp328.pdf.

[9] The Senate and House Reports recognized the bill as a whole, which necessarily included the SRE provisions, was directed toward, inter alia, energy security. *See* S. Rep. No. 109-78, at 2, 18-19 (2005); H.R. Rep. No. 109-215, pt. 1, at 169.

[10] 42 U.S.C. § 7545(o)(9)(A)(i).

[11] *Id.* § 7545(o)(9)(A)(ii)(II).

[12] *Id.* § 7545(o)(9)(B). The CAA does not define "disproportionate economic hardship."

communities."[13] In an explanatory statement, Congress explained that "a small refinery with profits sufficient to cover RFS compliance costs might nonetheless be subject to a disproportionate economic hardship"[14] and noted the potential importance to demonstrating DEH of "competitive disparities, especially where unique regional factors exist, including high diesel demand, no export access, and limited biodiesel infrastructure and production."[15]

Congress tasked DOE to study whether small refineries would suffer DEH from RFS compliance.[16] DOE issued a study in March 2011 finding that small refineries were experiencing DEH.[17] The DOE study explained that small refineries with low refining margins could experience DEH, and that "[r]egional and local factors" also could impact small refineries' ability to comply with the RFS.[18] Thus, DOE recommended exempting numerous small refineries because of DEH.[19]

DOE's 2011 Study also included a matrix to score numerous variables relevant to determining DEH for small refineries. It includes two major indices: "(1) a structural and economic weightings index and (2) a viability index."[20] The structural and economic portion comprised nine factors: (1) Access to capital/credit; (2) Other business lines besides refining and marketing; (3) Local acceptance of renewable fuels; (4) Percentage of diesel production; (5) Subject to exceptional state regulations; (6) Relative refining margin measure; (7) Renewable fuel blending (% of production); (8) In a niche market; (9) RINs net revenue or cost.[21] The viability index portion comprised three factors: (1) compliance cost eliminating efficiency gains, (2) individual special events, and (3) compliance costs likely to lead to shut down. No single factor governs whether a small refinery experiences DEH. EPA's new interpretation scraps how DOE and EPA have historically defined DEH, and is contrary to Congressional intent to protect strategic energy

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[13] *HollyFrontier,* 141 S. Ct. at 2175 (quotation marks and citations omitted); *see also id.* at 2179 (noting "the possibility that small refineries might apply for exemptions in different years in light of market fluctuations and changing hardship conditions").
[14] *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1224 (10th Cir. 2020) (citing 161 Cong. Rec. H9693, H10105 (daily ed. Dec. 17, 2015)); see also S. Rep. No. 114-281, at 70 (2016).
[15] *RFA*, 948 F.3d at 1224 (citing 161 Cong. Rec. H9693, H10105 (daily ed. Dec. 17, 2015)).
[16] 42 U.S.C. § 7545(o)(9)(A)(ii)(I)); Dept. of Energy, Office of Policy and International Affairs, D. Vashishat et al., Small Refinery Exemption Study 2 n.8 (Mar. 2011), https://www.epa.gov/sites/default/files/2016-12/documents/small-refinery-exempt-study.pdf [hereinafter "2011 DOE Study"].
[16] 2011 DOE Study, *supra*, at vii, 22-23.
[17] *Id.* at 25.
[18] *Id.* at vii, 22-23.
[19] *Id.* at viii.
[20] Dep't of Energy, Office of Energy Pol'y & Sys. Analysis, Addendum to the Small Refinery Investigation Study: An Investigation into Disproportionate Economic Hardship (May 2014), https://www.epa.gov/sites/default/files/2016-12/documents/rfs2-small-refiner-study-addendum-05-2014.pdf.
[21] 2011 DOE Study, *supra*, at 33, Tbl. 10.

assets such as small refineries.[22] EPA has not explained why all of these factors are suddenly irrelevant to analyzing disproportionate hardship, simply saying that the whole matrix "assumed the refineries did not recover RIN costs and did not address the cause of the hardship."[23] The 2011 DOE Study explains why all these factors are relevant to assessing DEH,[24] and EPA must address each one before concluding that RIN cost pass through or the requirement that economic hardship be caused by the RFS negates all these other factors.[25]

The proposal ignores DOE's ongoing role in analyzing DEH under the SRE program, despite Congress instructing EPA otherwise. EPA is required by statute to consider DOE's findings and other economic factors when evaluating SRE petitions for DEH.[26] EPA has not adequately rebutted this in its reversal.

EPA has issued over one hundred fifty SREs since the program's inception.[27] In granting scores of SRE petitions from 2016 to 2018, among the principal factors that EPA considered in evaluating these petitions were "RIN prices and the cost of compliance through RIN purchases."[28] EPA has acknowledged "DOE's expertise in evaluating economic conditions at U.S. refineries," and generally has deferred to DOE's recommendations to grant SRE relief.[29] Moreover, EPA adopted the Department of Energy's definition of DEH from the 2011 DOE Study[30] and treated DEH as depending on numerous factors, including the "impact on the ability of the refinery to remain competitive and profitable" and "other economic factors, including . . . profitability, net income, cash flow and cash balances, gross and net refining margins, ability to pay for small refinery improvement projects, corporate structure, [and] debt and other financial

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[22] *See* Section II.C - D. The proposal ignores DOE's statutory role in analyzing DEH under the SRE program. 42 U.S.C. § 7545(o)(9)(B)(ii) ("In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors."); *id.* (o)(9)(A)(ii) ("[T]he Secretary of Energy shall conduct for the Administrator a study to determine whether compliance with the requirements of paragraph (2) would impose a disproportionate economic hardship on small refineries."). *See also* 2011 DOE Study, *supra*, at 25.

[23] SRE Denial, *supra*, at 13.

[24] *See* 2011 DOE Study, *supra*, at 33-36.

[25] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (Agencies must "provide a reasoned explanation for its action" and "display awareness that it is changing position.").

[26] *See* note 22, *supra*.

[27] EPA, RFS Small Refinery Exemptions Tbl. 2, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Dec. 16, 2021).

[28] EPA, Financial and Other Information to Be Submitted with 2016 RFS Small Refinery Exemption Requests (Dec. 6, 2016).

[29] *See, e.g.,* "Decision on 2018 Small Refinery Exemption Petitions," Memorandum from Anne Idsal, Acting Assistant Administrator, Office of Air and Radiation to Sarah Dunham, Director, Office of Transportation and Air Quality (Aug. 9, 2019).

[30] EPA, Financial and Other Information to Be Submitted with 2016 RFS Small Refinery Exemption Requests (Dec. 6, 2016).

obligations."[31] Thus, EPA always treated DEH as a "holistic evaluation" and never as a "single question."[32]

Case law, too, rejects EPA's proposed approach. Courts have rejected interpretations construing the CAA's SRE provisions narrowly and focusing on a single factor to the exclusion of all others. The Fourth Circuit's *Ergon-West Virginia v. EPA* decision held that EPA must consider a small refinery's argument that it could not pass through its RIN costs.[33] Additionally, the Tenth Circuit's *Sinclair Wyoming Refining Co. v. EPA* decision rebuked EPA for reading into "disproportionate economic hardship" a requirement that RFS compliance must threaten the small refinery's viability;[34] in other words, the court criticized EPA for "tak[ing] the holistic evaluation required by Congress and morph[ing] it into a single question."[35] Likewise, the Supreme Court's *HollyFrontier* decision rejected a Tenth Circuit analysis construing the term "extension" too narrowly to require that small refineries continuously maintain an SRE to remain eligible for SREs, when the statute requires no such unbroken continuity.[36] Finally, while the Tenth Circuit's decision in *Renewable Fuels Association v. EPA* held that DEH cannot be based on hardships not caused by the RFS,[37] this holding does not require all of a refinery's hardships to be *solely* caused by the RFS[38] akin to a contributory negligence scheme. Such an interpretation would represent an unduly narrow interpretation of the SRE provisions of the kind the Supreme

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[31] *Id.*; *see also id.* ("Documentation may also include loan covenants and restrictions affecting the purchase of RINs, discussion of local impediments to blending, a discussion of local market conditions negatively impacting a refinery's ability to comply with its RFS obligation, [and] a discussion of the extent of RFS compliance costs relative to refinery operations margins and capital expenditures.").
[32] *See Sinclair Wyo. Ref. Co. v. EPA*, 874 F.3d 1159, 1171 (10th Cir. 2017).
[33] *Ergon-W. Va., Inc. v. EPA*, 896 F.3d 600, 613 (4th Cir. 2018).
[34] *Sinclair*, 874 F.3d at 1169.
[35] *Id.* at 1171.
[36] *HollyFrontier*, 141 S. Ct. at 2181; *id.* at 2179. ("Far from indicating that a refinery may apply for an exemption in a future year only if it has always received one in the past, this language suggests a much more 'expansive meaning.'" (quoting *United States v. Gonzales*, 520 U. S. 1, 5 (1997)). Indeed, the SRE provision allowed small refineries to petition EPA "at any time," again belying the notion that the SRE provision should be interpreted narrowly. *Id.* at 2181. *See also id.* at 2181 ("But this Court has made clear that statutory exceptions are to be read fairly, not narrowly, for they "are no less part of Congress's work than its rules and standards—and all are worthy of a court's respect." (quoting *BP p.l.c. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1539 (2021)).
[37] *See* SRE Denial, *supra*, at 15 ("Second, the court found that EPA may grant relief only when it finds that the small refinery would suffer DEH due to compliance with the RFS program and not due, even in part, to other factors."); *RFA*, 948 F.3d at 1254 ("Granting extensions of exemptions based at least in part on hardships not caused by RFS compliance was outside the scope of the EPA's statutory authority.").
[38] The *RFA* opinion does not require EPA to exclude consideration of any hardships partially caused by something other than the RFS. *RFA*'s "in part" language refers not to hardships caused only in part by the RFS, but to SREs granted in part based on hardships not caused by the RFS. *See RFA*, 948 F.3d at 1254.

Court rejected in *HollyFrontier*.[39] While that aspect of the Tenth Circuit's decision[40] was not before the Supreme Court, this is not license to ignore the Supreme Court's decision. EPA should heed the direction of the federal courts and reject its unduly narrow proposed interpretation of "disproportionate economic hardship."

II. EPA's New Approach Improperly Prejudges SRE Petitions Using a Flawed Macro Analysis, Rather than Considering Each Applicant's Individual Circumstances, as the CAA Requires.

EPA's new interpretation, effectively eliminating all future SREs, is inconsistent with Congressional intent, recent court decisions, EPA's and DOE's longstanding interpretations, evidence, and logic.

A. The CAA Requires Individual Analysis Based on Multiple Factors.

The CAA's SRE provisions require EPA to adjudicate each small refinery's individual petition considering the petitioning refiner's unique circumstances and local conditions.[41] There is no one-size-fits-all conclusion. While we appreciate EPA's transparency in publishing its proposed decision for comment, AFPM notes that commentors are not privy to applicant-specific data and cannot provide informed comment to EPA on unique market conditions that individual SRE petitioners confront.

Sweeping statements and analyses about the industry as a whole or the average refinery obfuscate relevant individual differences between refineries in industry-wide averages. Indeed, that is why Congress instructed DOE to reevaluate whether small refineries experience DEH by including small refineries in their survey.[42] EPA must address the circumstances that applicants

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[39] Additionally, following the Supreme Court's decision in *HollyFrontier*, the Tenth Circuit recalled its prior mandate, vacated its prior judgment, and issued a new order affirming EPA's decision and returning jurisdiction to the agency. Consequently, EPA should afford little, if any, weight to the Tenth Circuit's prior decision.

[40] *See* SRE Denial, *supra*, at 15 ("On June 25, 2021, the Supreme Court held that the term 'extension' as used in CAA section 211(o)(9)(B) does not include a continuity requirement and reversed the Tenth Circuit opinion only on that issue. The Supreme Court did not review the other two holdings in RFA as those were not appealed by the small refineries.").

[41] 42 U.S.C. § 7545(o)(9)((B)(i) (explaining that the Administrator must "evaluat[e]" the "petition").

[42] *See* 2011 DOE Study, *supra*, at 2 n.8; *RFA*, 948 F.3d at 1223 ("A report from the Senate Committee on Appropriations criticized the DOE's 2009 study. The report stated that '[t]he Committee understands the study contained inadequate small refinery input, did not assess the economic condition of the small refining sector, take into account regional factors or accurately project RFS compliance costs.' S. Rep. No. 111-45, at 109 (2009). The Committee generally directed the DOE to 'reopen and reassess the Small Refineries Exemption Study,' and specifically directed the DOE to 'seek and invite comment from small refineries on the RFS exemption hardship question, assess RFS compliance impacts on small refinery utilization rates and profitability, evaluate the financial health and ability of small refineries to meet RFS requirements, study small refinery impacts and regional dynamics

have raised in their petitions and explain why these circumstances do not demonstrate that refineries sometimes pass through RIN costs.[43] EPA's macro analysis ignores these individual circumstances and ignores DOE's explanation why the numerous factors in its matrix were relevant.[44]

Moreover, the SRE provisions expressly provide that DEH depends on multiple factors, as EPA is required to consider both DOE's analysis and "other economic *factors*,"[45] thus recognizing DEH is not a single question test.

B. Case Law Requires Individual Analysis Based on Multiple Factors.

Case law rejects EPA's proposed approach. EPA's new interpretation effectively prevents all small refineries from ever obtaining an SRE and contradicts the Supreme Court's direction that the exemption provision be interpreted fairly, not narrowly.[46] Furthermore, *Ergon* requires EPA to consider each small refinery's argument that it cannot pass through its RIN costs, and *Sinclair* recognizes that DEH requires a "holistic analysis" and does not depend on a single factor alone. Yet EPA ignores small refineries' individual circumstances with its across-the-board conclusion that all refineries fully pass through their RIN costs, as well as compresses the DEH analysis into the single question regarding whether small refineries pass through RIN costs. While this broad conclusion may help EPA quickly dispose of dozens of long-overdue pending SRE petitions, it cannot withstand judicial scrutiny.[47]

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by [Petroleum Administration for Defense District, or] PADD, and reassess the accuracy of small refinery compliance costs through the purchase of renewable fuel credits.' *Id.* (brackets added). A House conference report added that '[t]he conferees support the study requested by the Senate on RFS and expect the Department to undertake the requested economic review.' H.R. Rep. No. 111-278, at 126 (2009).").

[43] *Ergon*, 896 F.3d at 613 (explaining EPA must allow applicants to demonstrate that they face unique market conditions that support findings of DEH based on incomplete passthrough); see also 2011 DOE Study, *supra*, at 3 ("Small refineries could have particular obstacles that would make compliance more costly than those of large integrated companies. Compliance costs and characteristics of small refineries that make them more vulnerable to financial distress may be unique to each small refinery."); *id.* at 23 ("Larger refiners have options available on a scale well beyond those available to smaller refiners. Large integrated refiners can more easily obtain financing for blending facilities, generate options, accommodate their needs efficiently and shift emphasis from one sector to another as opportunities indicate. For example, over the past couple of years, compliance strategies for larger companies included engaging in joint ventures with ethanol producers, investing in companies in the renewable sector, or conducting research on renewable fuels. As a result, RFS2 compliance costs for the larger refiner may be a small part of overall operating costs."); *id.* ("Small companies are more limited in their options. They face a number of challenges and access to capital is generally limited or not available. Even when capital is available, they may have to choose between making substantial investments in blending and investing in other needed facilities to improve operating efficiencies to remain competitive.").

[44] *See* 2011 DOE Study, *supra*, at 33-36.

[45] 42 U.S.C. § 7545(o)(9)(B)(ii).

[46] *HollyFrontier*, 141 S. Ct. at 2181.

[47] *See Sinclair*, 874 F.3d at 1171.

The Tenth Circuit's decision in *Renewable Fuels Association v. United States EPA* does not compel EPA's proposed conclusions. Regarding the potential inconsistency in EPA's determination that small refineries suffer DEH but can pass through their costs to the consumer,[48] EPA need only analyze and explain that not all markets are perfectly competitive and that not all refineries can fully pass through their RIN costs. The Tenth Circuit decision, which was vacated, does not require EPA to jettison the SRE program by concluding that *no* small refinery *ever* experiences DEH. EPA must not prejudge whether individual small refineries may completely recover their RIN costs throughout the compliance year. Additionally, even *RFA* recognized that EPA should analyze DEH "on a case-by-case basis in response to small refinery petitions,"[49] rather than ignoring case-specific evidence and arguments on issues such as RIN cost pass through.

EPA's myopic focus on RIN costs ignores other costs the RFS program imposes on obligated parties, such as through substituting renewable fuels for petroleum fuels and other regulatory compliance costs like personnel, consulting, legal, RIN trading, and other costs incurred to ensure the small refinery maintains RFS compliance[50]—all of which, given the size of small refineries, may create DEH. Not only that, even if costs per RIN are the same, cost-per-RIN is not the most relevant metric. DOE has recognized RIN costs *relative* to revenue is relevant—and for good reason.[51] Congress established SREs because there may be certain inherent disadvantages small refineries face due to their lack of scale.[52] Smaller refineries produce less fuel—under 75,000 barrels per day—and may have smaller margins as costs are spread over a small volume of products. Likewise, Congress judged that such refineries may have higher RIN costs *relative* to the volume of products produced. DOE recognized this in their scoring matrix, and EPA has failed to explain why cost per RIN is not only relevant, but a dispositive element of disproportionate economic hardship.[53]

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[48] *RFA*, 948 F.3d at 1253-54.
[49] *Id.* at 1222.
[50] *E.g.*, 2011 DOE Study, *supra*, at 23 ("The cost for small refiners to comply with the RFS2 requirements can be substantial. Costs associated with consultants and attorneys to ensure compliance, and joining RINStar or similar services can be burdensome. Their limited product slates coupled with an inability to blend renewable fuels means that many of the small refiners must enter the market to buy RINs. The cost to meet their individual RVO makes this aspect the most significant cost of compliance.").
[51] DOE's scoring matrix considers both relative refining margin measure and whether RINs are a net revenue or cost. *See id.* at 33, Tbl. 10; *see also* EPA, Financial and Other Information to Be Submitted with 2016 RFS Small Refinery Exemption Requests (Dec. 6, 2016) ("Documentation [to support an SRE petition] may also include . . . a discussion of the extent of RFS compliance costs relative to refinery operations margins and capital expenditures.").
[52] *HollyFrontier*, 141 S. Ct. at 2175.
[53] See note 8, *supra*, on the disproportionate burdens small refineries have faced complying with a previous regulatory program that had shuttered many small refineries, which SREs were designed to avoid.

C. EPA Fails to Support its RIN Cost Pass Through Analysis.

EPA's analysis regarding RIN cost pass through is fatally flawed. EPA asserts RIN costs are both the same and passed through for all obligated parties. EPA has failed to support both conclusions, particularly given that the cost of compliance with the RFS is not merely the cost of RINs.

RIN costs are not equal for all parties. *When* a company buys RINs matters. As EPA well knows, RIN prices fluctuate dramatically, so RIN costs will be different among obligated parties, depending on when RINs are purchased.[54] EPA cannot ignore this obvious reality. Also, EPA's explanation that the structure of the RFS and EPA's design of the RIN program systemically prevent DEH[55] strains credulity. Simply put, Congress established the RFS program[56] and authorized an artificial market to generate and trade compliance credits[57]; *notwithstanding these features*, Congress provided for SREs because Congress understood small refineries could still experience disproportionate economic hardship.

Furthermore, EPA's analysis fails to support its conclusion that *all* markets operate to pass through *all* RIN costs. The market into which refineries sell transportation fuels in the U.S. is not one monolithic market.[58] Each of the approximately 1,500 petroleum racks in the U.S. is a unique market, and the differences are relevant to a company's ability to pass through the cost of RINs, just as the individual differences between refineries are relevant to RIN cost pass through.[59] For example, small refiners often have to discount fuel to the published rack price,

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[54] Buying RINs ratably is not required by the statute, nor is it always feasible for small refiners. Various factors, such as limited or highly variable cash flow and debt covenant requirements, limit small refiners' ability to acquire RINs ratably. Additionally, more frequent RIN purchases increases a company's peripheral cost per RIN (e.g., broker fees). Likewise, in many cases small refiners have limited access to and ability to raise capital compared to other refiners because they have fewer assets. In any event, contrary to EPA, see SRE Denial, *supra*, at 49, it is the RFS that forces small refiners to purchase RINs and thus decide when to purchase RINs; whatever the cost, that cost is imposed by the RFS.

[55] SRE Denial, *supra*, at 17 ("The very market-based design of the RFS program with the RIN system for compliance has equalized the cost of compliance among all market participants, making it highly unlikely any one refinery would face a disproportionate cost of compliance."). EPA's statement contradicts its previous position, repeatedly stated in annual RFS rulemakings, that RFS program flexibilities may provide "insufficient" assistance to small refineries. *See, e.g.*, 85 Fed. Reg. 7016, 7049-50 (Feb. 6, 2020).

[56] SRE Denial, *supra*, at 8-9.

[57] 42 U.S.C. § 7545(o)(5). Indeed, most of EPA's credit trading system was required by Congress.

[58] Many small refiners also cannot export fuel, which gives them lower leverage and results in discount to rack price. EPA ignores that competitive circumstances like these *do* impact the prices small refiners receive and thus whether their RIN costs are passed through. *See, e.g.,* SRE Denial, *supra*, at 58.

[59] *See* Pirrong, Analysis of the RFS Program and the 2019 Proposed Standards 2, 14-16 (Aug. 17, 2018), https://www.fuelingusjobs.com/library/public/Study/Exhibit_A_Pirrong_Study.pdf (explaining that the 2019 RFS requirements could make East Coast refineries unprofitable); *id.* at 27 (explaining that refineries do not always pass through RIN costs to consumers); *id.* at 13-15, 29 (explaining that refining margins impact RFS compliance burdens); Charles River Associates, Review of Updated Pass-Through Analysis of Knittel, Meiselman and Stock 3

particularly during certain times of year[60] or under certain circumstances. Discount to published rack prices is often done at terminals due to inventory constraints, the need to turn over volumes at leased facilities to avoid penalties for exceeding the refiner's leased terminal volume (for both ethanol and BOBs), to incentivize moving large volumes, and to compete with refiners discounting to move large volumes.[61] Thus, examining published rack prices is insufficient to demonstrate prices reflect RIN costs.

Similarly, EPA's analysis of a handful of markets fails to demonstrate anything regarding pass through in other, different markets in which particular small refineries operate. Moreover, EPA's lumping all small refineries into a single category may hide outliers who cannot pass through RIN costs.[62] And, again, *when* an obligated party buys RINs matters. Even if a refiner that purchases RINs at the same time that it sells its products could fully pass-through RIN costs to the buyer through a higher sale price, refiners may not always purchase RINs at a time when their RIN costs would be fully passed through. If a refinery sells fuel when fuel prices are low, but buys RINs when RIN prices are high, that refinery likely did not pass through all its RIN costs to wholesalers or blenders.[63]

(Feb. 2017) (explaining that one study relied upon by EPA omitted important variables and included problematic variables that undermined the study's reliability and conclusions); Charles River Associates, Re-examining the Pass-through of RIN Prices to the Prices of Obligated Fuels 8-9 (Oct. 2016) (demonstrating that RIN costs were not fully passed-through for domestic products in 2015 and 2016).

[60] As an example, refiners receive lower prices at year-end when liquidating inventory and prices received during COVID were at times discounted severely from rack prices.

[61] Moreover, small refiners may be less capable of executing day deals at a terminal because they move smaller volumes, which means that they may need to have a lower posting than other refiners to better compete for the marginal consumer against the refiner with the day deal. Terminal-owning refiners that can avoid these circumstances altogether are in a more advantageous competitive position. Finally, refusing to discount would also prevent barrels from moving, causing small refiners to have reduced terminal and pipeline allocations, making it more difficult to compete on equal footing during times they can better compete. EPA cannot ignore that these circumstances *do* impact the prices small refiners receive and thus whether their RIN costs are passed through. *See, e.g.,* SRE Denial, *supra*, at 58.

[62] *See id.* at 44-49. EPA's analysis ignores that there is no single market price for a day; there are a range of executed prices, and any static correlation of average prices and average RIN costs in a day simply cannot show that RIN costs are reflected in each refinery transaction. Indeed, if over much longer stretches than a single day prices do not reflect RIN cost, as EPA's own analysis recognizes, *see, e.g., id.* at 45 (discussing the impacts of COVID on price differentials between ultra-low-sulfur diesel and jet fuel), prices can diverge from RIN costs over much shorter stretches. Moreover, such a reflection is theoretical; RIN cost pass through cannot be analyzed *until* the refinery purchases RINs. In other words, EPA erroneously views pass through as a time slice rather than longitudinally; even when it does acknowledge pass through analysis requires a longitudinal study, EPA arbitrarily dismisses all longitudinal analysis by imposing an extra-statutory ratable RIN purchase requirement to obtaining an SRE. *See id.* at 49.

[63] Note that it is particularly difficult to pursue an ideal RIN purchasing strategy, and avoid these kinds of circumstances, in years when EPA fails to fulfill its statutory duty to timely promulgate an RFS annual rulemaking, as EPA recently has failed to do. EPA cannot fault small refineries for implementing RIN purchasing strategies that fail to predict future volatility accurately.

EPA's analysis rejecting a correlation between RIN costs and refining margins[64] fails to present an actual calculation of correlation and does not present any statistical controls for other variables affecting refining margins. Indeed, EPA acknowledges refineries lacking RIN costs have higher margins,[65] and most of the years on the chart appear *negatively correlated* with RIN costs, so it's unclear how EPA can say RIN costs do not impact refining margins.

Finally, even if RIN costs are passed through to consumers, EPA ignores that small refineries can still experience economic hardship. Congress designed the RFS program to increase the proportion of biofuels in the fuel supply. This necessarily results in lower volumes of refinery-produced fuels in the fuel supply than there would be without the RFS, which harms small refineries.

EPA's macro analysis ignores all these relevant differences, and thus is arbitrary and capricious. EPA's model should bend to reality, not reality to EPA's model.

D. EPA Should Interpret Causation to Requite Considering All Hardships Caused by the RFS.

EPA interprets the CAA to require that DEH be caused by the RFS.[66] Even if EPA is correct that DEH must be caused by the RFS, if any percentage of a small refinery's hardship is due to the RFS, EPA must then consider whether that portion of the hardship caused by the RFS is disproportionate. EPA cannot dismiss hardships caused by the RFS simply because other causes contributed to the small refinery's hardships too.[67] In other words, if a small refinery experiences $100 million in hardships caused by several factors, $30 million of which was caused by RFS compliance, EPA must consider whether the $30 million in RFS-caused hardships constitutes

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[64] *See* SRE Denial, *supra*, at 30-31.

[65] *See id.* at Fig. IV.D.2.b-1 ("The 'Small Refinery with Exemption' line was calculated by adding the 'RIN cost' line to the 'Small Refineries' line.").

[66] *See, e.g., id.* at 16 ("Under the approach we propose here, the small refinery must demonstrate a direct causal relationship between its RFS compliance costs and the DEH it alleges; assertions regarding other real but unrelated financial difficulties the refinery may be experiencing would not satisfy this requirement. Additionally, the small refinery must demonstrate how its specific RFS compliance costs are disproportionate compared to other refineries' RFS compliance costs and are of sufficient magnitude to warrant the exemption."); *id.* at 15 ("Second, the court found that EPA may grant relief only when it finds that the small refinery would suffer DEH due to compliance with the RFS program and not due, even in part, to other factors.").

[67] EPA explains that "[i]t would be illogical for the 'temporary hardship' provision to have been established as an opportunity to prop up businesses and provide relief for reasons wholly unrelated to the RFS program, the program from which it is providing relief. It would only make sense that, in implementing the RFS program, we provide relief from impacts of the RFS program that result from the RFS program itself." SRE Denial, *supra*, at 25. EPA forgets, however, that SREs do one thing, and one thing only: exempt the recipient from that year's RFS obligations, nothing more nothing less. EPA is not administering a program doling out monetary relief, wherein EPA must carefully tailor relief to ensure it is not alleviating harms beyond the RFS. Small refineries are not asking for relief beyond the RFS; they are asking for relief from it, and SREs by their nature cannot provide relief for anything other than hardships caused by the RFS.

DEH. Thus, EPA would only err by treating the full $100 million as constituting DEH under a requirement that hardships be caused by the RFS.[68]

Additionally, even if EPA were correct that only hardships caused by the RFS can qualify as DEH, the circumstances leading to those other hardships—the background structural and other characteristics affecting the refinery, such as those in DOE's scoring matrix—are nonetheless relevant to determining whether the small refinery will experience DEH from the RFS. In other words, EPA mistakes cause with effect.[69] For example, a small refiner's disadvantageous competitive position can render a small refinery vulnerable to DEH from the RFS[70]—just because it may also make the refinery vulnerable to *other* sources of hardship does not render this factor irrelevant to EPA's DEH analysis.

Indeed, these background characteristics are directly relevant to determining whether RFS hardships are *disproportionate*, which inherently has to do with the small refiner's circumstances that will never be the result of the RFS alone. Congress clearly envisioned providing SREs to small refineries in precarious and disadvantageous competitive circumstances. Thus, it would be improper to interpret causation such that a small refiner's poor competitive circumstances are irrelevant and ultimately disqualifying because these circumstances are deemed to contribute to their economic hardship. Nothing could be further from Congress's vision of assessing DEH than ignoring the particular circumstances of small refiners that make them more vulnerable to an RFS burden.

Congress did not design the SRE provisions so that the same features that would satisfy the statutory requirement that a small refinery's hardships be "disproportionate" would disqualify the small refinery under a statutory requirement that the small refinery experience "economic hardship" caused by the RFS.[71] To read the terms in isolation, therefore, is impermissible because it is contradictory and illogical—it fails to construe the phrase as a harmonious whole, in

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[68] *RFA* is consistent with this approach, and any interpretation that does not allow EPA to consider these harms violates the CAA. *See* notes 37-39 and accompanying text, *supra*.

[69] *See, e.g.,* SRE Denial, *supra*, at 24 ("Thus, the best reading of the statutory language is that compliance with the RFS program must be the impetus for DEH warranting an SRE under section A, meaning that a small refinery may not simply experience a year of poor economic performance or struggle with disadvantageous operational or market constraints to merit an SRE. Nor can a refinery rely on unplanned events like a fire, natural disaster, or planned events such as paying out stock dividends or other capital purchases/loans to qualify for relief from its RFS obligations.").

[70] A small refinery's geographic location, for example, influences the degree to which a small refinery is vulnerable to experiencing DEH. Among other things, some small refiners may be at a relative disadvantage to refiners located in states with renewable fuel blending incentives beyond the RFS mandates.

[71] *See* Scalia & Garner, Reading Law: The Interpretation of Legal Texts 180-182 (2012); *id.* at 180 ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.").

its proper statutory context, giving effect to each word of "disproportionate economic hardship."[72]

EPA must recognize the specific purpose of the SRE provision is what matters, not the RFS program.[73] While part of the purpose of the RFS is to subsidize renewable fuel blending,[74] the purpose of SREs, which is to protect and preserve the competitiveness of small refineries,[75] should not be given short shrift.

E. EPA's Discount and Pass-Through Theories are Inconsistent with EPA's Position that Higher RIN Prices Incentivize Market Creation and Infrastructure Buildout for Mid- and High-Level Ethanol Blends.

EPA's discount theory posits that blenders of renewable fuel can—and because of competitive forces, *must*—discount blended fuel prices by the price of the associated RIN.[76] EPA also maintains that promulgating aspirational renewable volume obligations encourages the buildout of infrastructure for mid- and high-level ethanol blends (which most existing infrastructure cannot handle because of ethanol's corrosivity) and thus consumption of such blends.[77] Yet, if blenders discount renewable fuel prices in proportion to RIN prices, and thus receive no windfall profits, how can higher RIN prices encourage infrastructure buildout by blenders? Moreover, if refiners' RIN costs are passed through and do not harm the refiner, why would RIN prices encourage refiners to build infrastructure? EPA's own analysis is predicated upon blenders having to discount in proportion to RIN prices, and refiners recouping their RIN passed through

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[72] Scalia & Garner, *supra*, at 167-69, 174-82.

[73] Just as the specific provision prevails over a general, the specific purpose of a provision is a more relevant interpretive aid than the general purpose of a statute. *Cf.* Scalia & Garner, *supra*, at 183 ("Under [the General/Specific] canon, the specific provision is treated as an exception to the general rule."); *id.* at 168 ("It is not a proper use of the [Whole-Text] canon to say that since the overall purpose of the statute is to achieve *x*, any interpretation of the text that limits the achieving of *x* must be disfavored.").

[74] SRE Denial, *supra*, at 25.

[75] *See HollyFrontier*, 141 S. Ct. at 2175 ("Congress was concerned that escalating [RFS] obligations could work special burdens on small refineries that lack the inherent scale advantages of large refineries, and sometimes supply a major source of jobs in rural communities." (quotation marks and citations omitted)

[76] *See, e.g.*, SRE Denial, *supra*, at 3, 26-29, 33-34, 38, 42, 44.

[77] *See, e.g.,* 86 Fed. Reg. at 72,452 ("We believe this may incentivize the continued expansion of the infrastructure necessary to use higher level blends of ethanol, which remains the dominant form of conventional renewable fuel. In recent years, ethanol consumption beyond the E10 blendwall in the U.S. has been limited by infrastructure constraints (as well as other factors) to a volume significantly lower than the volume of ethanol produced in the U.S. and the total production capacity of the U.S. ethanol industry. If these infrastructure constraints are addressed, domestic ethanol consumption and ultimately domestic ethanol production could increase, and this could result in job creation, rural economic development, higher corn prices for farmers, and a greater supply of agricultural commodities. . . . Moreover, we believe that providing incentives for increased ethanol distribution and blending infrastructure through the higher implied volumes of conventional renewable fuel may result in the potential for greater renewable fuel consumption in future years.").

costs, thus creating a wash no matter the RIN price. EPA never acknowledges this inconsistency, let alone resolves it, rendering its analysis arbitrary and capricious.

F. Remanded 2018 SREs

In an email dated January 3, 2022, EPA provided notice that EPA was considering whether to include the 36 SRE petitions from 2018—remanded by the D.C. Circuit to EPA on December 8, 2021 in *Renewable Fuels Association v. EPA*, No. 19-1220—in its proposed denial of all outstanding SRE petitions. In additional to the concerns stated in these comments, EPA's denial of SREs that were granted years ago raise additional concerns regarding retroactivity, reliance interests, the RIN bank, inadequate domestic supply, and RIN volatility that EPA's proposal fails to consider.[78] EPA must consider all these issues in any action EPA takes on the remanded 2018 SREs.

III. Conclusion.

AFPM appreciates the opportunity to provide its perspective on this critical issue. AFPM opposes the blanket denial of the 65 pending SRE petitions based on a macro analysis, as this is an improper interpretation of DEH under the CAA. EPA assumes the existence of perfect markets nationwide with every obligated party receiving full compensation for the cost of the RINs they must surrender for compliance and blenders willing to forego profit in markets where they have power. EPA's broad conclusion on RIN pass through ignores that individual refineries may be forced to discount their fuel below the prevailing price at the rack. EPA's reliance on published rack prices ignores this discounting, which is of central relevance to the issue of RIN pass through and DEH. EPA should once again examine SRE petitions on a case-by-case basis and adopt AFPM's approach to causation and pass-through, which is consistent with DOE's matrix, the CAA, and judicial interpretations of the SRE provisions.

Respectfully submitted,

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[78] AFPM's comments on EPA's consideration of the potential denial of 36 remanded 2018 SRE petitions are incorporated by reference. *See* American Fuel & Petrochemical Manufacturers, Comment Letter on Proposed Notice of Opportunity To Comment on Proposed Denial of Petitions for Small Refinery Exemptions; Notice Regarding Remand of 2018 RFS Small Refinery Exemption Decision (Feb. 7, 2022).